

PG. AHMAD PG. HJ. ABDULLAH, RE: EX P; ORIENTAL BANK BHD.

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HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[BANKRUPTCY NOTICE NO. K. 818 OF 1990]
27 SEPTEMBER 1991

BANKRUPTCY: *Validity of bankruptcy notice - Exact amount due not stated - Claim for a sum lesser than the amount due - Did not follow prescribed form - Certain words missing from notice - Whether defective - Whether formal defect - Penal or quasi-penal consequences - Whether creditor can elect to claim lesser sum - Bankruptcy Act 1967, ss. 131, 133 - Bankruptcy Rules, r. 91, form 5.*

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The respondent (judgment creditor) obtained a default judgment against the applicant and proceeded to issue and serve a bankruptcy notice on the applicant. The applicant contested the validity of the notice and asked that it be set aside on the grounds that:

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- (i) the notice was not in the prescribed form and manner as stipulated under the Bankruptcy Act 1967 Act (the Act) and Bankruptcy Rules 1969 (the Rules) as firstly, it did not state the exact amount due at the date of the bankruptcy notice, secondly that certain words were missing from the notice and thirdly that the bankruptcy notice did not refer to the judgment upon which the notice was issued; and

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- (ii) that the sum claimed was excessive, extortionate and erroneous.

It became evident later on that the respondent had claimed for a sum lesser than the amount due.

The issue was whether the sum claimed in the bankruptcy notice, which was a lesser sum than the amount that should be actually owing as at the date of the issue of the notice, was an incorrect sum which affected the validity of the notice.

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Held:

[1] In this case, the respondent did not elect to claim a lesser sum as this sum resulted from the mistakes made by the bank and its accountants or officials as to the dates and the periods. It is the duty of the creditor both to state the correct amount due and to comply with the rules and forms under the law.

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[2] The defect in the incorrect amount claimed, although it was of a lesser sum than due and despite learned Counsel's undertaking to forgo the balance, was not a formal defect as the amount misled the applicant. As a result of the serious penal or quasi-penal consequences which follow a bankruptcy notice, a judgment creditor must comply with the strict letter of the law and use the correct format as prescribed in the rules.

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[Bankruptcy notice set aside.]

Cases referred to:

Fawzia bte Osman v. Bank Bumiputra Malaysia Bhd. [1991] 1 CLJ (Rep) 113 (dist)
Ghazali bin Mat Noor v. Southern Bank Bhd. & Four Other Appeals [1989] 1 CLJ (Rep) 35 (foll)
Hamidah bte Abdul Hamid & Anor. v. Polynesia Offshore Supplies (B) Bhd. [1990] 3 MLJ 94 (foll)
Lim Boon Peng v. United Orient Leasing Co. Bhd. [1991] 1 CLJ (Rep) 270 (foll)
Lim Kim Guan, Re; ex parte Four Seas Communications Bank Ltd. [1990] 3 CLJ (Rep) 757; [1991] 1 MLJ 330 (cons)
Low Mun v. Chung Khiaw Bank [1987] CLJ (Rep) 172 (cons)

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a Legislation referred to:

Bankruptcy Act 1967, ss. 131, 133

Bankruptcy Rules 1969, r. 91, Form 5

Rules of the High Court 1980, O. 13 r. 1(1)

For the judgment debtor - John Sikayun; M/s. Luping & Co.

For the judgment creditor - Caroline Liau; M/s. Wong Yapp Chung & Co.

b**JUDGMENT****Syed Ahmad Idid JC:**

The facts of this case include:

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- (1) Judgment in default of appearance (O. 13 r. 1(1) of the Rules of the High Court, 1980) was ordered against the applicant on 22 February 1986.
 - (2) Bankruptcy notice was issued on 6 September 1990.
 - (3) Notice was served on the applicant on 31 October 1990.
 - (4) Applicant filed this notice of motion on 6 November 1990 to contest the validity of the notice and asked that it be set aside.

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What could have been seen as a trivial issue and so either the applicant could have accepted the notice with the deficiencies therein termed as “formal defects” (under s. 131 of the Bankruptcy Act 1967) and so not invalidate the proceedings or that the respondent bank could have withdrawn the notice and refile. But both parties were spirited in their arguments. This was understandable as the various judgments appear to strengthen the opposing sides.

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It was put to this Court that one Judge sitting on two cases had decided differently (and so here the applicant and the respondent both hoped that the law was on their side).

The grounds of the application to set aside the notice were that:

- (i) it was defective in that it was not in the prescribed form and manner as stipulated under the 1967 Act and the Bankruptcy Rules 1969 and that
- f** (ii) the sum claimed (RM54,731.48) was “excessive, extortionate and erroneous”.

The Supreme Court in *Ghazali bin Mat Noor v. Southern Bank Bhd. & Four Other Appeals* [1989] 1 CLJ (Rep) 35 held:

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- (1) For a bankruptcy notice to be valid it should state the exact amount due at the date of the bankruptcy notice. The judgment debtor must know the exact amount he has to pay to avoid the bankruptcy. He does not have to make calculations or enquiries.

This was a landmark judgment where the Supreme Court went to the extent of explaining how the claim should be particularised. The lessons emanating therefrom should be of guidance to the banks and other corporations, not to mention the legal practitioners who need to advise their clients.

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In our instant case, the judgment creditor had claimed for the judgment debt of RM39,097.38 and agreed interest at the rate of 16% per annum from 1 September 1985 to 22 February 1986 at RM2,299.25. There was dispute on the claim for statutory interest as the commencement date was also 22 February 1986 and this, according to applicant, showed that the judgment creditor had claimed 24% (16% plus 8%) on that day. The learned Counsel for the judgment creditor conceded on this and urged the Court to have the date changed to “23” instead of

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22 February 1986. Both parties did not seem to agree on the quantum, for example, according to the judgment creditor, the statutory interest from 22 (now 23) February 1986 to 6 September 1990 was for 1,345 days at RM12,409.85 whereas the judgment debtor argued that the sum came to only RM11,525.69 (causing an excess of RM885.16)

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In the affidavit filed by learned Counsel, Miss Caroline Liau stated that:

... the amount claimed in the bankruptcy notice is less than the actual amount owing, as the number of days where statutory interest is due is 1,657 days amounting to RM15,294.11.

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Learned Counsel then volunteered in Court to forego the “RM3,000 plus” (RM15,294.11 minus RM11,525.69) or RM3,768.42 to be exact. If the applicant or his Counsel had accepted this offer, the action could have ended there and then but obviously the applicant did not want the reductions.

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So the Court had to proceed on the principles of the law. The judgment in *Low Mun v. Chung Khiaw Bank* [1987] CLJ (Rep) 172 at p. 177 stated that:

Non-compliance with the terms of the judgment renders the bankruptcy notice invalid and failure to comply with such a notice is not an act of bankruptcy and bankruptcy petition founded on it must necessarily fail.

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Thean J in the Singapore case of *Re Lim Kim Guan ex parte Four Seas Communications Bank Ltd.* [1990] 3 CLJ (Rep) 757 had observed that:

Case law, although not strictly on point, shows how strictly the Courts have construed and treated a bankruptcy notice because of the serious consequences which ensue upon a debtor’s non-compliance with the notice.

Thean J held that:

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... no act of bankruptcy has been committed by the debtors and both the bankruptcy petitions must fail and are dismissed.

But in two other bankruptcy petitions as a sequel to His Lordship’s decision in *Re Lim Kim Guan (supra)*, (see [1991] 1 MLJ 330), His Lordship decided that the objections raised by the debtors on the respective petitions failed and accordingly made the receiving order and adjudication order against each.

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The decisions were not in contradiction as had been suggested. It was clear in these cases that:

In the case of an under-demand or understatement of a judgment debt every cent that is demanded in the bankruptcy notice is due to the creditor and the only question is whether such under-demand or understatement of the judgment debt is capable of misleading or embarrassing or perplexing the debtor concerned and if **it does not**, s. 133 operates to validate the bankruptcy notice.

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So the question in our case is: did the under-demand by “RM3,000 plus” which the judgment creditor now puts forward, mislead or perplex the debtor (or applicant here)? His affidavit dated 6 November 1990 said that the bankruptcy notice was erroneous and he was right on two counts:

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- (i) the amounts stated were not “**exact** amount due at date of bankruptcy notice” (see *Ghazali bin Mohd. Noor’s* case);
- (ii) the dates and number of days differ and were also wrong.

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- a** The Supreme Court judgment of *Lim Boon Peng v. United Orient Leasing Co. Bhd.* [1991] 1 CLJ (Rep) 270 is illustrative where Mohd. Azmi SCJ said:

Much had been said about the requirement that the amount quantified in the body of the notice must be the correct sum owing as at the date of the bankruptcy notice. The question in this appeal was, was a sum less than the amount that should be actually owing as at the date of the issue of the notice, an incorrect sum for the validity of the notice?

- b** The learned Supreme Court judge (in the same case) added:

... if they **elect** (emphasis added) for some reason to claim for a lesser sum, or where it is not possible to quantify the maximum sum, it could not by itself render the bankruptcy notice bad in law for the simple reason that it could not possibly affect the correctness of the sum actually owing as at the date of issue of the bankruptcy notice.

- c** The main criterion in the instant case was: did the judgment creditor **elect** to claim the lesser sum? The obvious answer was “**no**” - the lesser sum came about because the bank and its accountants or officials made several mistakes as to the dates and the periods. I would have decided otherwise had the lesser sum come about because the bank had a heart or was caring for the customers and decided, for example, that instead of the 16% agreed interest, it was lowering the rate to 10%. The total sum claimed would be **less** and this would have been sufficient for me to rule that the applicant’s notice of motion be dismissed.

- d** The applicant also argued that the bankruptcy notice was not in accordance with Form 5 (r. 91) as these words were missing from the notice:

... claimed by them as being the amount due on a final judgment obtained by them against you in the High Court at (place) dated 22 February 1986 for the sum of RMX plus agreed interest from 10 June 1980 to 21 February and statutory interest from the date of judgment to the date of payment and RMX costs.

- e** It was also urged upon this Court that the bankruptcy notice did not refer to the judgment relevant upon which the notice was issued.

- f** It is the duty of the creditor both to state the correct amount due and to comply with the rules and forms under the law. In this case, the bankruptcy notice issued by the judgment creditor against the applicant somewhat differ in several aspects. I am at a loss to understand why the firm representing the judgment creditor did not follow the wordings already set out clearly in form 5.

- g** The case of *Fawzia bte Osman v. Bank Bumiputra Malaysia Bhd.* [1991] 1 CLJ (Rep) 113 is not relevant as the applicant here did not face the same problem of interest “to date of actual realization”.

I find that the defect in the incorrect amount claimed, though the amount was of a lesser sum than due and despite learned Counsel’s undertaking to forgo the balance, was not a formal one. It misled the applicant. The bankruptcy notice must be in prescribed form and not deviate as had occurred here.

- h** I come to this conclusion because of the serious consequences following a bankruptcy notice - it can lead to penal or quasi-penal consequences. So all who contemplate taking someone to Court to have him/her declared as a bankrupt must have sound grounds to do so, must comply with the strict letter of the law and use the correct format as prescribed in the bankruptcy rules.

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To conclude, I shall quote from *Hamidah bte Abdul Hamid & Anor. v. Polynesia Offshore Supplies (B) Bhd.* [1990] 3 MLJ 94, where the Court of Appeal in Brunei held that:

... it is clear that bankruptcy proceedings are of a quasi-penal nature and it is imperative that the procedural requirements are strictly complied with.

I therefore order that the bankruptcy notice dated 6 September 1990 issued against the applicant be set aside. There will be no order as to costs.

Also found at [1991] 3 CLJ 2899

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